STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 25, 2003
v	No. 235558 Oakland Circuit Court
MYRON EUGENE WOOD, Defendant-Appellant.	LC No. 2000-171088-FC

Before: Meter, P.J., and Jansen and Talbot, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession of 650 or more grams of cocaine, MCL 333.7403(2)(a)(i),[1] and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as an habitual drug offender, MCL 333.7413(1),[2] to life imprisonment for the drug offense and a consecutive two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

This case arises out of a multi-jurisdictional drug investigation in Oakland and Wayne Counties. Detroit police pulled over defendant's vehicle for a traffic violation. Defendant fled on foot, tossing a loaded handgun as he ran. A package was found on the passenger seat of defendant's vehicle. It contained 1,007 grams of cocaine. The police also found $6,000 in the vehicle.

I. Change of Venue from Macomb County to Oakland County

Charges (including one count of conspiracy) were originally filed in the Macomb Circuit Court. The prosecutor concluded that he lacked evidence tying any offense to Macomb County after the Macomb Circuit Court ruled that defendant's statements to the police would not be admissible at trial. As a result, the prosecutor successfully moved to change venue to Oakland County.

[1] He was originally charged with possession with intent to deliver more than 650 grams, MCL 333.7401(2)(a)(i), but was found guilty of the lesser-included offense of mere possession.

[2] Defendant raises no question on appeal and raised no question below regarding the applicability of this statute to his circumstances.

Defendant argues that the Macomb Circuit Court erred when it transferred venue to Oakland County. We conclude that this issue was expressly waived, however, when defendant agreed with the prosecutor's motion to change venue and agreed that venue was proper in Oakland County. Defense counsel stated:

> Your Honor, I would concede that the prosecution of this – that this county would no longer have jurisdiction of this case under the conspiracy that was alleged in the transfer of the underlining [sic] count of possession with intent to deliver one kilo of cocaine or over 650 grams of cocaine would be proper in Oakland or Wayne county.
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> So if the Court wishes to transfer on that basis, I would have no objection.

See *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000) (waiver extinguishes any error).

Defendant argues that he did, in fact, object to changing venue. At a later proceeding in the Oakland Circuit Court, defense counsel indicated that he had raised objections off the record in the Macomb Circuit Court. Whether or not this is true, defendant's consent on the record negates any prior objections. Moreover, defendant's consent makes any future attempt to assert an objection ineffective because his consent extinguished any error. *Id*. Defendant's consent contributed to the court's decision to change venue without further discussion.

II. Change of Venue to Wayne County

After the case had been transferred to Oakland County, defendant filed a motion seeking to change venue to Wayne County. Defendant claims that the court erred when it denied his motion. We disagree.

Defendant had already consented to venue in Oakland County. Moreover, venue was proper in Oakland County. Although the offense was alleged to have occurred within Wayne County, it occurred within one mile of the Oakland County boundary and was originally investigated by Oakland County detectives. Therefore, MCL 762.3(1) (offense committed within one mile of county line may be prosecuted in either county), venue was proper in Oakland County.

III. Speedy Trial

On the first day of trial, defendant moved to dismiss the case due to delay in bringing his case to trial. In particular, he alleged that the twenty-six-month delay between his arrest and trial violated his constitutional right to a speedy trial and his statutory right under the 180-day rule, MCL 780.131.

In determining whether a defendant has been denied his right to a speedy trial, a court must consider: "'(1) the length of the delay, (2) the reasons for the delay, (3) whether the defendant asserted his right to a speedy trial, and (4) prejudice to the defendant resulting from the delay.'" *People v Mackle*, 241 Mich App 583, 602; 617 NW2d 339 (2000), quoting *People v Levandoski*, 237 Mich App 612, 620, n 4; 603 NW2d 831 (1999). We review the trial court's

decision de novo. *Id.* The circuit court found that some of the delay was caused by the defense, that the prosecution had made good faith efforts to bring the case to trial, and that the 180-day rule was inapplicable because defendant faced consecutive sentencing.

We agree that the 180-day rule is inapplicable here because defendant was a parolee for which consecutive sentences were required. *People v Chavies*, 234 Mich App 274, 280-281; 593 NW2d 655 (1999).

We also find no error in the circuit court's determination that defendant's constitutional right to a speedy trial was not violated. First, although the delay of twenty-six months between arraignment and trial was lengthy, about eight months of the delay was attributable to the adjournment of an earlier August 2000 trial date pursuant to a request by the defense. Moreover, although defendant maintains that he "consistently" asserted his right to a speedy trial, the record is devoid of any evidence of a prior request. Although he argues that he was ready to go to trial on January 27, 2000, the record of the proceedings for that day does not show that defendant requested to be tried. Instead, the record indicates that, rather than assert his right to a speedy trial, defendant consented to transfer venue to Oakland County that day, which clearly would have precluded a trial that same day. The only time defendant appears to have asserted any right to a speedy trial was on the first day of trial when he moved unsuccessfully to dismiss the charges due to the delay. Finally, we find no prejudice. No causal link is evident between the delay and defendant's assertion that res gestae witnesses could not be located. Under these facts, we find no violation of defendant's right to a speedy trial.

IV. Relationship Between Trial Attorney and Prosecutor

Defendant argues that his retained trial attorney had a conflict of interest because a listing of attorneys in the Michigan Bar Journal showed that the assistant prosecutor who handled a motion had once (perhaps after these proceedings) shared office space with defendant's counsel. Defendant asserts that he was unaware of this relationship. This matter was not raised below. Therefore, we review this unpreserved issue using a plain error analysis. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). We find no plain error.

To show a conflict of interest that denied him his right to a fair trial or the effective assistance of counsel, defendant must demonstrate that an actual conflict of interest adversely affected his lawyer's performance. *People v Smith*, 456 Mich 543, 556, 558; 581 NW2d 654 (1998). It is not apparent from the record that an actual conflict of interest existed, that defendant was not informed of any potential conflict, MRPC 1.7(b)(2), that defendant did not waive any potential conflict, *id.*, or that any conflict adversely affected counsel's performance. On the contrary, the record indicates that defense counsel vigorously argued defendant's motion for change of venue to Wayne County (albeit unsuccessfully), and there is no indication that he tempered his arguments due to any perceived connection with the assistant prosecutor.[3]

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[3] We note that the assistant prosecuting attorney in question appeared only once in this matter, to represent the prosecutor's office during defendant's motion for a change of venue. A different assistant prosecutor conducted the trial. The prosecutor at the motion hearing presented no arguments; he said, "Good morning" to the judge, he told the judge he had nothing to say in

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V. Testimony Regarding "Crack" Cocaine

Defendant next argues that the court erred by allowing witnesses to testify about "crack" cocaine. Defendant argues that "crack" was a prejudicial term in a case involving only the powder form of cocaine.

While examining a police officer about the street value of cocaine, the prosecutor asked about the differences between powder cocaine and crack cocaine. Defendant objected to the relevance because there was no evidence that the "crack" form of cocaine was involved in this case. The court agreed, but the prosecutor then indicated that the evidence was being offered to show the profit motive that would help demonstrate an intent to deliver the primary ingredient for a more profitable form of the drug. Defendant agreed that the officer could testify about the difference in value but argued that the process of turning powder into crack cocaine was irrelevant. The court ruled that the process of converting powder cocaine into crack cocaine could properly be incorporated into the officer's testimony about the higher profit derived from crack cocaine. The officer then testified about the manner in which powder cocaine is converted into crack cocaine.

On appeal, defendant argues that the testimony was irrelevant under MRE 401 and MRE 402 and was designed to inflame the passions and prejudices of the jury, thus violating MRE 403. The issue involving the relevance of the evidence was properly preserved by defendant's objection. That portion of the issue involving prejudicial references intended to inflame the passions and prejudices of the jury, however, was not preserved with an appropriate objection. See *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996) (an objection on one ground is insufficient to preserve an appellate attack on another ground). Accordingly, our review of that argument is limited to a plain error analysis. *Carines, supra* at 763.

The decision whether to admit or exclude evidence is "within the sound discretion of the trial court, and it will not be disturbed on appeal absent an abuse of discretion." *People v Watkins*, 176 Mich App 428, 430; 440 NW2d 36 (1989). We find no abuse of discretion under MRE 401 and MRE 402. When the proofs are circumstantial, evidence of motive is highly relevant. *People v Fisher*, 449 Mich 441, 453; 537 NW2d 577 (1995) (murder case). See also *People v Herndon*, 246 Mich App 371, 412-413; 633 NW2d 376 (2001) (in murder prosecution, motive was relevant to the issue of intent even if motive was not an element of the offense). Here, a profit motive was relevant to the element of the originally charged offense of "intent to deliver."

Turning to defendant's argument that use of the term "crack cocaine" inflamed the passions of the jury, we find no plain error under MRE 403. This case involved a large quantity

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response to the dialogue between the judge and defense counsel regarding the merits of the motion, he told the judge he would prepare the order memorializing the court's ruling, and he reminded the court that a pretrial hearing had also been scheduled for that morning so the court could set a trial date. We further note that it appears from the Michigan Bar Journal directory that defendant's counsel and the assistant prosecutor in question were associated with different firms.

of cocaine. Defendant has not shown how mentioning a different form of cocaine inflamed the passions of the jury. Indeed, the evidence was relevant to the intent to deliver element of the originally charged offense, but defendant was acquitted of that offense and found guilty of mere possession, thus indicating that the jury was not improperly influenced by the evidence.

VI. Sentencing Issues

Defendant argues that his sentence of life imprisonment for the drug offense is unconstitutional for two reasons. First, he argues that the Legislature is authorized under the Michigan Constitution to enact "indeterminate" sentences and, therefore, lacks the authority to enact "determinate" sentences (including life imprisonment). Second, he argues that life imprisonment for his offense violates the constitutional prohibition against cruel or unusual punishments. These issues were not raised below, but this Court is generally empowered to review unpreserved constitutional issues. *People v Davis*, 250 Mich App 357, 364; 649 NW2d 94 (2002). As an unpreserved constitutional issue, though, it is subject to limited review for plain error. *Carines, supra* at 763.

A. Legislative Authority to Impose Life Sentences

The Michigan Constitution authorizes the Legislature to enact punishments for criminal offenses:

> The legislature may provide for indeterminate sentences as punishment for crime and for the detention and release of persons imprisoned or detained under such sentences. [Const 1963, art 4, § 45.]

Defendant argues that the authorization to impose indeterminate sentences – that is, sentences that can vary depending on the circumstances of the offense or the offender – establishes that the Legislature is denied the authority to enact any other type of sentence. We disagree.

Determinate sentences are well established in Michigan.[4] In addition to prescribing a life sentence for certain habitual drug offenses, the Legislature has prescribed life sentences for first-degree murder, MCL 750.316, and provided sentencing courts discretion to consider life sentences for other offenses, such as second-degree murder, MCL 750.317, first-degree criminal sexual conduct, MCL 750.520b, and armed robbery, MCL 750.529. The Legislature has also enacted determinate sentencing schemes for non-capital offenses such as felony-firearm, MCL 750.227b.

The clear language of art 4, § 45, evidences an intent to *permit* the Legislature to enact indeterminate sentences. It does not, however, indicate an intent to *limit* the Legislature's authority to enact only one type of sentence. We have previously held that determinate sentencing schemes do not violate art 4, § 45. *People v Snider*, 239 Mich App 393, 426-428; 608 NW2d 502 (2000) (mandatory life imprisonment for first-degree murder); *People v Cooper*, 236

[4] For purposes of this appeal, we will assume that a "life" sentence is a determinate sentence rather than an indeterminate one. See *People v Legree*, 177 Mich App 134, 143-144; 441 NW2d 433 (1989).

Mich App 643, 660-664; 601 NW2d 409 (1999) (mandatory two-year sentence for felony-firearm). We are bound by those decisions under MCR 7.215(I), and defendant has not persuaded us that they were wrongly decided.

B. Cruel or Unusual Punishment

Defendant argues that any mandatory, non-parolable life term of imprisonment constitutes cruel or unusual punishment under the Michigan Constitution, Const 1963, art 1, § 16. Defendant argues this Court should adopt the remedy imposed by *People v Bullock*, 440 Mich 15, 37-42; 485 NW2d 866 (1992), and declare that he be eligible for parole consideration after a period of time.[5] We disagree.

In *People v Poole*, 218 Mich App 702, 715-716; 555 NW2d 485 (1996), this Court upheld a mandatory life sentence without parole imposed upon an habitual drug offender under MCL 333.7413. Although the offense at issue in *Poole* involved delivery as opposed to possession, the *Poole* Court also emphasized the habitual nature of the defendant's offense. *Poole*, *supra* at 716-717. We conclude that given the habitual nature of defendant's conviction in the instant case, no constitutional violation occurred with regard to his sentence.

Affirmed.

/s/ Patrick M. Meter
/s/ Kathleen Jansen
/s/ Michael J. Talbot

[5] In *Bullock*, *supra* at 42-43, the Supreme Court held that defendants convicted of possession of more than 650 grams of a controlled substance under MCL 333.7403(2)(a)(i) shall be eligible for parole after ten years.